

**GETTING TO THE TRADING ZONE**  
**LESSON #5:**  
**PREPARING AN EFFECTIVE PRE-MEDIATION**  
**MEMO**

There is some controversy surrounding Mediation briefs: should they look like legal briefs, should they provide the evidence as Exhibits, should they be exchanged or confidential, should they reveal weaknesses as well as strengths, how long or how brief?

***You don't need to agonize about the fine points of your brief if you do this.***

First of all, let's stop thinking of the Mediation Brief as a legal pleading or motion. If we think of it as a "Memo to Mediator" submitted in advance of the mediation, I think it will free the disputants and their lawyers to be a little more candid.

Second, I am not an advocate of sharing all of the Memo with your adversary: if you choose to exchange briefs, than certainly communicate some of the finer points separately to the mediator in a less formal way via email or separate submission.

The Memorandum should do what trial lawyers do best: tell a story of your case as you would to the Judge or Jury. Who is your client? What happened to him/her? What was the result? What does he/she want? As the Defendant, you will want to highlight your defenses to this story by again answering the questions: who is bringing the lawsuit? What does your client stand for? What happened from your perspective? How do you evaluate the damages if liability is proven?

Briefly summarize the facts, the salient evidence and also the settlement efforts and negotiations thus far. If there are legal issues that have yet to be tested, include those, too.

Feel free to ignore the rules of evidence if it means you can better highlight what your client really thinks, heard or saw. Focus on the issues where the evidence is nuanced and vulnerable to construction or inference for or against your client. That is where the real work of the mediator will kick in—helping each side to analyze and evaluate the likelihood of successful persuasion on the issues remaining in dispute.

Finally, if you can, give the mediator a "heads up" on your confidence and that of your client as to a particular result at trial. Although we may discount it because of the typical "overconfidence" of litigants and their counsel, we will at least have a hint as to what extent you are open to compromise and concession.

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Problem Solver. Mediator. Author. Ally.

And one more thing: busy mediators can't read or adequately prepare for your case if you send a box of documents the night before your hearing. Many of us are mediating 3-5 cases per week. Make sure to get your Memo in no later than the Friday before the week of your hearing, so we can spend the weekend with it if necessary.